

Ottawa, Tuesday, December 16, 1997

File No.: PR-97-027

IN THE MATTER OF a complaint filed by NOTRA Environmental Services Inc. under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4th Supp.), as amended;

AND IN THE MATTER OF a decision to conduct an inquiry into the complaint under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

**DETERMINATION OF THE TRIBUNAL**

Pursuant to section 30.14 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is not valid.

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.  
Member

Michel P. Granger  
Michel P. Granger  
Secretary

Date of Determination: December 16, 1997

Tribunal Member: Robert C. Coates, Q.C.

Investigation Manager: Randolph W. Heggart

Counsel for the Tribunal: Gerry Stobo

Complainant: NOTRA Environmental Services Inc.

Government Institution: Department of Public Works and Government Services



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## FINDINGS OF THE TRIBUNAL

### INTRODUCTION

On October 16, 1997, NOTRA Environmental Services Inc. (NOTRA) filed a complaint under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> (the CITT Act) concerning the procurement (Solicitation No. W8476-4-CB71/A) by the Department of Public Works and Government Services (the Department) of services relating to the demilitarization of ammunition and related products by means of a standing offer for the Department of National Defence (DND) and Correctional Service of Canada (CSC).

NOTRA alleged that its offer was technically compliant and was the lowest-priced offer. NOTRA further alleged that the Department improperly declared its offer non-responsive for failing to address the provisions relating to the Federal Contractors' Program for Employment Equity set out in clause 6.2 of the Request for a Standing Offer (RFSO).

NOTRA requested, as a remedy, that the Canadian International Trade Tribunal (the Tribunal) direct the Department to reverse the award that it made to SNC Industrial Technologies Inc. (SNC) and re-direct the standing offer to NOTRA, along with an amount of \$500,000.00 in damages for expenses and loss of reputation. In the alternative, NOTRA requested compensation in the amount of \$939,974.65 for the damage to its reputation and lost opportunity.

### INQUIRY

On October 20, 1997, the Tribunal determined that the conditions for inquiry set forth in section 7 of *Canadian International Trade Tribunal Procurement Inquiry Regulations*<sup>2</sup> (the Regulations) had been met in respect of the complaint and decided to conduct an inquiry into whether the procurement was conducted in accordance with the requirements set out in Chapter Five of the *Agreement on Internal Trade*<sup>3</sup> (the AIT).

1. R.S.C. 1985, c. 47 (4th Supp.).
2. SOR/93-602, December 15, 1993, *Canada Gazette* Part II, Vol. 127, No. 26 at 4547, as amended.
3. As signed at Ottawa, Ontario, on July 18, 1994.

On October 21, 1997, the Tribunal, pursuant to subsection 30.13(3)<sup>4</sup> of the CITT Act, issued an order postponing the award of any contract in relation to the standing offer until the Tribunal determined the validity of the complaint. The Tribunal made this decision as no urgency was documented on the record of the complaint and in order to preserve the broadest range of remedies as set out in subsection 30.15(2)<sup>5</sup> of the CITT Act.

On October 29, 1997, the Department, pursuant to subsection 30.13(4)<sup>6</sup> of the CITT Act wrote to the Tribunal certifying that the procurement was urgent and that a delay in the award of a contract would be contrary to the public interest. On October 30, 1997, the Tribunal issued an order rescinding its postponement of award order of October 21, 1997.

On November 17, 1997, the Department filed with the Tribunal a Government Institution Report (GIR) in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.<sup>7</sup> On November 27, 1997, NOTRA filed comments on the GIR with the Tribunal.

Given that there was sufficient information on the record to determine the validity of the complaint, the Tribunal decided that a hearing was not required and disposed of the complaint on the basis of the information on the record.

## **PROCUREMENT PROCESS**

According to the Department, on January 19, 1995, it received a requisition for the establishment of a National Master Standing Offer (NMSO) for the demilitarization of ammunition and related products for DND and CSC. A Notice of Proposed Procurement (NPP) for the annual notification of the existence of a source list for the above-mentioned services was posted on the Open Bidding Service (OBS) on December 27, 1996. As a result of this notice, NOTRA submitted a request to be added to the source list. After a review of its application, NOTRA was added to the list. On January 31, 1997, the Department posted an NPP on the OBS for the establishment of an NMSO to perform demilitarization services on ammunition and related products and made available to potential suppliers an RFSO with a closing date of February 28, 1997.

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4. "Where the Tribunal decides to conduct an inquiry into a complaint that concerns a designated contract proposed to be awarded by a government institution, the Tribunal may order the government institution to postpone the awarding of the contract until the Tribunal determines the validity of the complaint."

5. "Subject to the regulations, where the Tribunal determines that a complaint is valid, it may recommend such remedy as it considers appropriate, including any one or more of the following remedies:

(a) that a new solicitation for the designated contract be issued;

(b) that the bids be re-evaluated;

(c) that the designated contract be terminated;

(d) that the designated contract be awarded to the complainant; or

(e) that the complainant be compensated by an amount specified by the Tribunal."

6. "The Tribunal shall rescind an order made under subsection (3) if, within the prescribed period after the order is made, the government institution certifies in writing that the procurement of the goods or services to which the designated contract relates is urgent or that a delay in awarding the contract would be contrary to the public interest."

7. SOR/91-499, August 14, 1991, *Canada Gazette* Part II, Vol. 125, No. 18 at 2912, as amended.

The RFSO included, in part, the following:

**1.10 VENDOR PERFORMANCE CLAUSE**

1. Canada may reject a bid where any of the following circumstances is present:
  - b) with respect to current or prior transactions with the Government of Canada
    - ii) the Bidder refuses to provide information necessary to understand or evaluate its bid;
2. Where Canada intends to reject a bid pursuant to paragraph 1, the Contracting Authority will so inform the Bidder and provide the Bidder ten (10) days within which to make representations, prior to making a final decision on the bid rejection.

**1.13 NOTE TO BIDDER**

Changes to proposals will not be accepted after the closing date.

**2.1 SCOPE OF WORK**

The ammunition shall be destroyed, recycled or redistributed in a safe, non-toxic and environmentally responsible manner, so that no part, material or explosives can or will be re-used for its intended purpose.

**2.3 BASIS OF SELECTION**

To be considered responsive, an offer must meet all of the mandatory requirements of this RFSO. Offers not meeting all the mandatory requirements will be given no further consideration.

**6.2 EMPLOYMENT EQUITY (FOR CANADIAN OFFERORS ONLY)**

The Federal Contractors Program for Employment Equity requires that some organizations bidding for federal government contracts make a formal commitment to implement employment equity, as a precondition to the validation of their bids. All bidders must check the applicable box(es) below. Failure to do so will render the bid nonresponsive.

Program requirements do not apply for the following reasons(s):

bid is less than \$200,000;

this organization has fewer than 100 permanent part-time and/or full time employees across Canada;

this organization is a federally regulated employer;

or, program requirements do apply:

copy of signed Certificate of Commitment is enclosed; or

Certificate number is \_\_\_\_.

(Emphasis added)

During the bid solicitation period, a bidders' conference was held, which NOTRA attended. As well, during the same period, 13 amendments to the RFSO were issued in response to questions received by suppliers or to extend the RFSO's closing date. No question concerning the employment equity conditions in the RFSO was raised or submitted by any bidder on the above-mentioned occasions.

The RFSO closed on May 21, 1997. According to the Department, a total of six offers were received by the Department. At the conclusion of the bid evaluation process conducted between May and

August 1997, two offers, that of SNC and that of another bidder, were declared compliant with all the mandatory evaluation criteria. NOTRA's proposal did not address the mandatory requirements of clause 6.2 of the RFSO. Accordingly, NOTRA's proposal was declared non-responsive and was not considered any further. SNC, having been determined the responsive bidder with the lowest aggregate costs offer, was awarded the NMSO. On August 28, 1997, the Department posted a contract award notice to this effect on the OBS.

## **VALIDITY OF THE COMPLAINT**

### **NOTRA's Position**

NOTRA submits that, on January 31, 1997, it forwarded a letter to the Department, SNC and another company which addressed its status with respect to the employment equity clause. NOTRA further submits that it made the following statements in its offer:

- NOTRA was "in compliance and adherence to the terms and conditions of the standing offer";
- NOTRA "will fully comply with all laws, degrees and regulations of Canada during the performance of the Work..."; and
- NOTRA complied with "all terms and conditions in the RFSO".

NOTRA states that, following the submission of its bid, it was queried by and responded to the Department's contracting authority regarding its financial response to the RFSO. This, NOTRA submits, is contrary to the Department's statement that NOTRA's bid "was non-responsive because it did not meet one of the mandatory requirements, namely the conditions of the Employment Equity clause, and no further consideration was given to its bid." In this context, NOTRA asked itself why it was queried by the Department on its financial response if it was indeed non-responsive.

NOTRA contends that the Department failed to comply with its own criteria set out in clause 1.10.2 of the RFSO. Although the Department has stated, in the GIR, that a request for the missing information about the employment equity clause "would be construed as bid repair and not bid clarification," NOTRA submits that, without requesting this bid clarification, the Department could not conceivably know whether or not NOTRA had made an omission or was refusing to "provide information necessary to understand or evaluate its bid." NOTRA believes that the Department's decision to reject its offer is both presumptuous and not in the best interest of the Canadian taxpayer.

### **Department's Position**

In its response to the complaint, the Department submits that the onus is on the bidder to prepare and submit all information required to evaluate properly its offer. NOTRA, the Department submits, admits<sup>8</sup> that it failed to do so. The Department further submits that this failure on the part of NOTRA did not result in a situation requiring clarification. To do so would have been tantamount to allowing bid repair, which is not permissible, as it would amount to allowing NOTRA to modify its offer after bid closing. The Department submits that because: (1) the employment equity clause is a mandatory requirement of the RFSO; (2) the RFSO clearly indicated that failure to provide the required information in respect of clause 6.2 would render the bid non-responsive; and (3) NOTRA has admitted to failing to include in its offer a duly annotated copy of pages 17

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8. NOTRA's letter of September 9, 1997, to the Minister of Public Works and Government Services.

and 18 of the RFSO, which contain the employment equity clause, due to an administrative error, it had no other alternative but to declare NOTRA's offer non-responsive.

Concerning NOTRA's allegation that the letter that it sent to the contracting authority dated January 31, 1997, addressed, in part, the employment equity clause requirements, the Department states that it did not receive this letter. In any event, this letter, if sent at all, was sent outside NOTRA's offer and was not incorporated either expressly or by reference in its offer. The matter was never raised again by NOTRA in a subsequent letter, during the bidders' conference or through the questions addressed to the Department during the solicitation period. The above explains why the Department did not reply to the letter. Furthermore, the Department submits that the said letter did not form part of NOTRA's proposal and that to allow NOTRA to provide the missing information after bid closing would be construed as bid repair and not bid clarification.

With respect to NOTRA's allegation that the Department should have treated its omission as a refusal to provide information pursuant to paragraph 1.10.1 b) ii) of the "Vendor Performance Clause" of the RFSO, the Department submits that this paragraph does not apply to the situation. Indeed, NOTRA never refused to provide information. In fact, by signing the RFSO, it indicated that it agreed to comply with all terms and conditions. Rather, it failed, through omission, to provide certain mandatory information.

Concerning NOTRA's allegation that it was technically compliant because it had been previously placed on the Department's source list, the Department submits that being placed on a source list does not mean that a supplier is automatically considered responsive and qualified to perform demilitarization services for ammunition and related products. The solicitation was a completely separate and distinct process. Supplier qualification and bid responsiveness are only determined upon evaluation of each bid for specific requirements. Further, the Department denies that it or DND informed NOTRA that its offer was technically compliant. Indeed, the Department states that the evaluation team could not determine whether or not NOTRA's offer was technically compliant because the technical evaluation was never completed in accordance with the evaluation criteria. Further, the Department submits that NOTRA could not infer that its offer was still under serious consideration on or about August 21, 1997, simply because it was asked to extend the validity period of its bid. Indeed, according to the Department, it is a standard practice, if the validity period must be extended, to request all bidders to do so, be they responsive or non-responsive.

Finally, concerning NOTRA's allegation that SNC may not meet certain work requirements of the RFSO, the Department states that SNC's offer was not discussed during NOTRA's debriefing. As well, the Department submits that SNC is able to demilitarize all of the ammunition types listed in the RFSO and this in compliance with the mandatory criteria set out in clause 2.1 of the RFSO. In summary, the Department submits that the procurement process was conducted in accordance with the provisions of the AIT and that NOTRA's offer was properly evaluated as non-responsive. Consequently, the Department requested its costs of defending the complaint.

### **TRIBUNAL'S DECISION**

Section 30.14 of the CITT Act requires that, in conducting an inquiry, the Tribunal limit its consideration to the subject matter of the complaint. Furthermore, at the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the

Regulations provides, in part, that the Tribunal is required to determine whether the procurement was conducted in accordance with the requirements set out in Chapter Five of the AIT.

The principal question which the Tribunal must decide is whether or not the Department conformed to the evaluation methodology and criteria set out in the RFSO in evaluating NOTRA's offer.

Article 506(6) of the AIT provides, in part, that "[t]he tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria."

The Tribunal is satisfied that the requirements dealing with employment equity were clearly set out in clause 6.2 of the RFSO. Further, the Tribunal is satisfied that bidders knew the consequences of not responding properly to these requirements because the RFSO clearly stated: "All bidders must check the applicable box(es) below. Failure to do so will render the bid nonresponsive."

There is no dispute that NOTRA did not respond to the requirements of clause 6.2 of the RFSO in its offer. However, in this respect, NOTRA submits that it has met the substantive requirements of clause 6.2 through its letter of January 31, 1997, to the Department wherein it stated, in part, that "[a]s a small Canadian company NOTRA is exempt from the provisions of clause 6.2 in the above mentioned document." In addition, NOTRA submits that the Department should have resorted to the provisions of paragraph 1.10.1 b) ii) and subclause 1.10.2 of the RFSO before declaring its offer non-responsive. Indeed, without specifically asking NOTRA, the Department could not properly determine whether or not NOTRA omitted to provide certain information in respect of employment equity or refused within the meaning of paragraph 1.10.1 b) ii) to provide the information.

In respect of the first issue, the Tribunal observes that NOTRA's letter of January 31, 1997, though possibly sent to the Department by NOTRA, was not received by the Department. The Department never responded to the letter, and the matter raised by NOTRA in its letter of January 31, 1997, regarding employment equity was not raised again by NOTRA at the bidders' conference that it attended or by means of written questions during bid preparation. Irrespective of whether NOTRA sent the January 31, 1997, letter or not, it did not form part of NOTRA's offer. If it was sent, it was before NOTRA submitted its offer with respect to the particular RFSO. Further, it only tangentially touched on NOTRA's employment equity status. The thrust of the letter was to complain about the different employment equity requirements faced by Canadians when compared with potential foreign suppliers. The Tribunal is of the view that the letter could not then and cannot now be considered to be part of NOTRA's offer. To add it to NOTRA's offer would modify its offer in respect of a mandatory requirement after the bid closing date. The RFSO is quite clear at clause 1.13 that "[c]hanges to proposals will not be accepted after the closing date."

Concerning paragraph 1.10.1 b) ii) and subclause 1.10.2 of the RFSO, the Tribunal is of the view that these provisions do not apply to the matter in dispute. The Tribunal is satisfied that NOTRA failed or omitted to provide certain mandatory information in respect of the employment equity clause due to an administrative error. In the Tribunal's opinion, the Department is not required, as NOTRA suggests, to contact potential suppliers to ask questions about the offers that they submitted. The Tribunal is also of the view that the purpose of paragraph 1.10.1 b) ii) and subclause 1.10.2 is not to determine intent, but to secure information necessary to understand or evaluate information already in a bid. The Tribunal is of the view that, in this instance, no additional information was required by the Department to evaluate NOTRA's compliance with the mandatory requirements. Essential information was missing from NOTRA's offer in respect of



employment equity and, for that reason, in the Tribunal's opinion, it was proper for the Department to declare NOTRA's offer non-responsive.

Concerning NOTRA's claim that it was technically compliant because it had been previously placed on the Department's source list for the demilitarization of ammunition and related products, the Tribunal notes that there is no basis to this claim. In the Tribunal's opinion, the source list simply highlights a pool of potential suppliers that have been given approval to bid on certain requirements. It does not permit those potential suppliers to avoid meeting all the mandatory requirements in an RFSO which may follow.

In respect of NOTRA's claim that its offer was declared technically compliant by DND and/or the Department and that SNC, the contract awardee, may not meet certain work requirements of the RFSO, the Tribunal is of the view that there is no foundation in fact to support these claims.

The Department has asked for its costs in this matter. Under the circumstances, the Tribunal does not feel that it is an appropriate case to award costs against NOTRA. The complaint, while unsuccessful, was not without merit, and NOTRA has lost a significant contract opportunity due to its omission.

Before leaving this case, the Tribunal wishes to comment on a matter arising in this case which caused it concern. The Tribunal issued a postponement of award order on October 21, 1997. The Department responded by certifying that the procurement was urgent and that a delay in the award of a contract would be contrary to the public interest. NOTRA made submissions to the Tribunal with respect to the government's decision to invoke this provision. In the eyes of the Tribunal, nothing in the explanation provided by the government in support of its certification would, it seems, have justified the use of that provision. The Tribunal believes that these certifications should only be used in cases where there truly is an urgency or public interest reasons which support the award of the contract while the Tribunal conducts its inquiry. By postponing the award of the contract at the outset of a complaint which is accepted for investigation, the Tribunal can preserve the widest possible range of remedies, should the complaint be held to be valid. To date, the Tribunal has not adjudicated on the merits of a government department's certification. Without commenting on how it will decide such a matter, if requested to do so, the Tribunal believes that the government should resort to this extraordinary authority in only those cases where it is necessary. In such cases, the Tribunal would expect that an explanation by the government department would be provided in support of the certification.

#### **DETERMINATION OF THE TRIBUNAL**

In light of the foregoing, the Tribunal determines, in consideration of the subject matter of the complaint, that the procurement was conducted in accordance with the AIT and that, therefore, the complaint is not valid.

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Robert C. Coates, Q.C.  
Member